No. 97-7521
A-511

RECEIVED
JAN 15 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

LESLIE LEE GOSCH,
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the Director Gary L. Johnson, Director of the Texas Department of Criminal Justice, Institutional Division, Respondent,[1] and files this Brief in Opposition.

OPINION BELOW

The Fifth Circuit denied Gosch's motions for certificate of appealability and stay

[1] For clarity, Respondent will be referred to as "the Director" and Petitioner Rogelio Rangel Hernandez as "Hernandez."

of execution on January 15, 1998. *Gosch v. Johnson*, No. 98-40042 (5th Cir. Jan. 15, 1998).

JURISDICTION

Gosch seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Gosch bases his claims upon the Supremacy Clause, Eighth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of Petitioner Lesley Lee Gosch ("Gosch") pursuant to a judgment and sentence of the 290th District Court of Bexar County. Gosch is scheduled to be executed on January 15, 1998. By an indictment filed on January 8, 1986, in Cause No. 86-CR-0010, Gosch was charged in the 290th District Court of Bexar County, Texas, with capital murder in violation of Section 19.03 of the Texas Penal Code. On June 30, 1986, Gosch's motion for change of venue was granted, and the case was transferred to the 24th District Court of Victoria County, Texas. Following a jury trial on the merits, which commenced on August 19, 1986, Gosch was found guilty of capital murder on September 2, 1986. After hearing additional evidence relating to punishment, the jury on September 4, 1986, affirmatively answered the two special issues presented pursuant to Article 37.071 of the Texas Code of Criminal Procedure.[2] In accordance with state law, the court imposed the death sentence.

[2] Pursuant to the provisions of Article 37.071 of the Texas Code of Criminal Procedure applicable at the time of Gosch's trial, the following two special issues were submitted to the jury:

Gosch appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed on December 18, 1991. *Gosch v. State*, 829 S.W.2d 775 (Tex. Crim. App. 1991). Gosch's motion for rehearing was denied on February 26, 1992. The United States Supreme Court denied certiorari relief on June 28, 1993. *Gosch v. Texas*, 509 U.S. 922, 113 S.Ct. 3035 (1993). Thereafter, the trial court scheduled Gosch's execution for on or before sunrise on September 17, 1993.

Without filing any pleading in the trial court, Gosch filed a motion for stay of execution to permit filing of an application for habeas corpus relief in the Texas Court of Criminal Appeals. No application for writ of habeas corpus was filed in any state court. The Court of Criminal Appeals denied the motion for stay of execution on September 13, 1993.

Still without attempting to obtain collateral relief in the state courts, Gosch on September 14, 1993, initiated a habeas action in the United States District Court for the Western District of Texas, San Antonio Division, pursuant to 28 U.S.C. §§ 2241, 2254. On September 15, 1993, the district court entered final judgment denying habeas relief.

Subsequently, on September 16, 1993, Gosch filed a motion to alter or amend judgment and to reconsider denial of motion for stay of execution. When this motion was denied, Gosch timely filed a notice of appeal. Thereafter, the district court issued a certificate of probable cause to appeal. A panel this court affirmed the judgment of the federal district court denying relief and denying a stay of execution. *Gosch v.*

1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of Rebecca Smith Patton would result?
2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Collins, No. 93-8635 (5th Cir. Sept. 16, 1993).

Also on September 16, 1993, following the Fifth Circuit's affirmance, Gosch filed an application for state habeas relief. The 226th District Court in Bexar County, Texas, recommended denial of relief. That evening, the Texas Court of Criminal Appeals denied Gosch state habeas relief. *Ex Parte Gosch*, No. 25-370-01 (Tex. Crim. App. Sept. 16, 1993). Shortly before midnight, September 16, 1993, Gosch filed a second federal habeas action in the United States District Court for the Western District of Texas. The federal district court granted a stay of execution pending disposition of the second petition.

On September 20, 1993, the district court *sua sponte* raised the question whether it had jurisdiction to consider the federal petitions. Following court-ordered briefing by the parties, the court on October 12, 1993, dismissed the first petition for want of jurisdiction, vacated the stay of execution, and, in the alternative, dismissed Gosch's second petition as an abuse of the writ. The Director filed a notice of appeal from the jurisdictional ruling to the United States Court of Appeals for the Fifth Circuit, and Gosch filed a cross-appeal with respect to the ruling in the abuse of the writ.

On October 19, 1993, the state trial court rescheduled Gosch's execution for April 15, 1994. On April 7, 1994, the United States Court of Appeals for the Fifth Circuit dismissed the petitions for writ of habeas corpus that had been filed in the United States District Court for the Western District of Texas on the basis of lack of subject matter jurisdiction, ruling that jurisdiction for habeas corpus petitions in Gosch's case lies only in the United States District Court for the Southern District of Texas.

Confronted with an imminent execution date of April 15, 1994, the Fifth Circuit on April 6th also ordered that, if Gosch intended to seek federal habeas relief, he must file his petition no later 5 p.m. on Thursday, April 7th. Following a motion for

rehearing, the Fifth Circuit on April 8th modified this order to provide that Gosch must file his federal petition by noon on Monday, April 11th. *Gosch v. Collins*, Nos. 93-8635 and 93-8780 (5th Cir. Apr. 8, 1994), *cert. denied*, *Gosch v. Scott*, 513 U.S. 836, 115 S.Ct. 116 (1994). Gosch did not file a federal petition in the Southern District of Texas until the instant petition, filed December 30, 1997.

On April 12, 1994, Gosch filed his second application for state habeas relief. The state court subsequently granted a stay of execution. Gosch's second state application was supplemented on October 14, 1994. On June 5-7, 1995, the 226th District Court, Bexar County, Texas, held an evidentiary hearing on the allegations in Gosch's second application for state habeas relief. On May 14, 1997, that court entered an order recommending that relief be denied. On September 10, 1997, the Texas Court of Criminal Appeals denied habeas relief. *Ex Parte Gosch*, No. 25,370-02 (Tex. Crim. App. Sept. 10, 1997). On October 10, 1997, the 226th District Court set an execution date of January 15, 1998. On November 21, 1997, the Texas Court of Criminal Appeals denied Gosch's request for a stay of execution. Gosch filed his instant application for federal habeas relief on December 30, 1997. The United States District Court, Southern District of Texas, Victoria Division, denied habeas relief and Gosch's motion for a stay of execution on January 12, 1998. Gosch filed a motion for certificate of appealability ("COA") with the district court on January 13, 1998. That court denied COA on January 14, 1998. That same day, Gosch filed a motion to alter and amend judgment, or in the alternative reopen judgment ("motion to alter"). That motion was denied on January 14, 1998.

In the evening of January 14, 1998, Gosch file a motion for certificate of appealability and motion for stay of execution in the Fifth Circuit Court of Appeals. That court denied all claims. *Gosch v. Johnson*, No. 98-40042 (5th Cir. Jan. 15, 1998).

B. Statement of Facts

1. Guilt-Innocence Phase

The evidence was summarized by the Court of Criminal Appeals as follows:

Accomplice Testimony

> The accomplice witness, Rogers, was a long-time acquaintance of appellant. At some point in 1984, Rogers lived with appellant and appellant's girlfriend, a woman named Georgina. In August of 1985, appellant told Rogers that he was concerned about going to federal prison on a weapons violation conviction. Appellant felt that it would not be "constructive" for him to be imprisoned for this offense and sought to have Rogers aid him in fleeing the country. The two originally planned to rob a bank but Rogers rejected this alternative as "too risky and too violent."
>
> The two then discussed a second alternative--that being kidnapping and ransoming the wife of a bank president. Appellant informed Rogers that he knew of two potential targets in the Alamo Heights area of San Antonio and, in the latter part of August of 1985, appellant began to focus on a specific target for his extortion scheme. In the latter part of August or early September of 1985, appellant first mentioned the name of Frank Patton as a potential target for the extortion plan.
>
> Approximately two weeks later, Rogers and appellant began to formalize their scheme. They drove by the Patton home in early September to ascertain whether the plan could be completed safely. In mid-September appellant and Rogers began to take steps to carry out their plans. They planned that appellant was to gain access to the Patton home under the guise of delivering flowers to Rebecca Patton. After entering the home, appellant was to bind his victim with duct tape and then take her to a secluded, rural area of Bexar County. Rogers' role was to go to North Star Mall

> and wait for Frank Patton to arrive with a ransom payment. Originally, this scheme was to begin on September 16, 1985.
>
> On September 15, 1985, appellant and Rogers made a dry run by the Patton residence. On September 16, at approximately 8:30 a.m., Rogers picked up appellant at the Windsor Park Mall's "Park and Ride." The two then drove to a Stop and Go convenience store located in the 500 block of Austin Highway near Alamo Heights. There Rogers purchased a soft drink along with a pastry and appellant bought a carton of milk. After leaving the store, Rogers and appellant drove around the Pattons' neighborhood to determine whether there was much activity on the streets and whether Rebecca Patton's automobile was parked at the home.
>
> While driving around the neighborhood, Rogers began having second thoughts. Rogers felt that they should carry out their plan another day because of problems with his car. Appellant was angered by Rogers' position; nevertheless, he agreed to cancel plans for that day. The two agreed to try again the next day, September 17, 1985. Rogers and appellant then left Alamo Heights.
>
> On the 17th of September, Rogers again rendezvoused with appellant at the Park and Ride. The pair once again drove to the same Stop and Go convenience store on Austin Highway. Once again Rogers' lack of courage and his misgivings about his automobile caused the operation to be postponed. The two agreed to try the next day.
>
> On September 18th, Rogers once again met appellant at the Park and Ride. They once again visited the Stop and Go convenience store on Austin Highway. Rogers and appellant then returned to the Pattons' neighborhood. After satisfying themselves that Mrs. Patton was at home, the two drove to Rogers' apartment so that appellant could change

his shirt. At Rogers' apartment, appellant changed out of a camouflage shirt and into a blue one belonging to Rogers' one-time roommate, Stephen Hurst. Rogers made a phone call (at approximately 10:30 a.m.) to the Patton residence to determine if Mrs. Patton was home alone. Rogers also called the bank where Mr. Patton worked. Rogers was informed that Mr. Patton was in a meeting; Rogers stated that he would call back. After calling the bank, Rogers and appellant returned to Alamo Heights.

Rogers drove appellant to the Pattons' neighborhood and dropped him off in the vicinity of the Patton home. Appellant left the car with a flower box containing a .22 caliber pistol, a black silencer and a roll of duct tape. Rogers then drove around the block twice; on the second trip around the block, Rogers saw appellant walking toward the bus stop. At this point Rogers picked up appellant. Appellant informed Rogers that no one had answered the door at the Patton home. The two drove around looking for a pay telephone. After finding one, appellant called the Patton home and spoke with Rebecca Patton. He told her that he was from a nursery and that he had sent a man to the house who was unable to deliver some flowers. Mrs. Patton apologized saying she had been unable to hear the door because she had been vacuuming.

At some point between 1:00 p.m. and 2:00 p.m., Rogers again called the Castle Hills bank and asked to speak with Frank Patton. Rogers used the fictitious name of Mr. Anderson in this second call and hung up as soon as Frank Patton answered the phone. After making his call to the bank, Rogers drove appellant back to the Pattons' neighborhood and once again dropped him off in the vicinity of their home. Rogers then drove to a liquor store with a pay telephone and waited for appellant to call.

Rogers stood by the phone for approximately twenty minutes awaiting appellant's call. The call never came; instead, appellant came running back to the phone booth.

Upon seeing Rogers, appellant stated, "There was no need to go get the money because [I] killed her."

When appellant got into the car, he removed the .22 caliber pistol, silencer and duct tape from the waistband of his blue jeans. The two drove back to appellant's apartment. At that time, appellant gave Rogers a black bag containing the Ruger automatic, two silencers, another handgun and some ammunition. Appellant also gave Rogers a bag containing appellant's shirt and shoes. Rogers placed all these items in the trunk of his car and returned to his apartment. With the exception of the shoes, Rogers took these items, along with a pair of gloves belonging to appellant, to his apartment. Rogers examined the murder weapon at the apartment and determined that it was no longer loaded. Rogers put the two pistols, the two silencers and the ammunition into a brown attache case and gave it to Stephen Hurst that evening. Rogers asked Hurst to take the weapons and put them up out of the way, or, as he phrased it, "put them in the deep freeze."

On the day after the murder, Rogers picked up appellant at the Wonderland Mall and they returned to Rogers' apartment. Appellant lived at Rogers' apartment until the two were arrested on September 25, 1985.

Non-accomplice Testimony

At approximately 11:00 a.m. on September 18, Sherry Satel, Rebecca Patton's friend, was talking with her over the phone. At some point in their conversation, Rebecca told Sherry that she had another call. She put Sherry on hold and came back on the line a "few seconds" later. Mrs. Patton told Mrs. Satel that someone had called to tell her they would be coming to her home to deliver some flowers. Mrs. Patton was puzzled about who might be sending her flowers. This phone conversation continued until approximately 12:30 p.m.

Sherry Covarrubias related that in September of 1985

she was employed by Stop and Go convenience stores in San Antonio. She was assigned to work the Stop and Go at 506 Austin Highway in Alamo Heights. According to Covarrubias, on September 18 appellant came into her store with a "heavy set" man who was taller than appellant (this individual was later identified as appellant's accomplice John Rogers). Covarrubias stated she recalled appellant because she had a conversation with him regarding the thick lenses on his glasses, and because he had been in the store a couple of times in the week prior to September 18th.

On September 18th, at approximately 2:25 p.m., Mrs. Patton called her husband on his private line at the bank. According to Frank Patton's secretary from the Castle Hills National Bank, Jo Ann Galindo, Mrs. Patton seemed to be in a strange frame of mind. Galindo felt that Mrs. Patton was acting unusually abrupt and unfriendly over the phone. Mrs. Patton told Galindo that she needed to speak to Frank; the secretary put the call on hold and informed Frank Patton that his wife was on the telephone. Moments later, Frank Patton waved Galindo into his office and began to write a note for her trying to explain that there was an extortion threat. Galindo left the office immediately and called the FBI. Another cashier began getting the ransom money together. According to Galindo, at approximately 12:30 that same day, an individual by the name of Mr. Anderson had called and asked to speak with Frank Patton.

Frank Patton testified that he was the president of the Castle Hills National Bank in San Antonio. He had been married to Rebecca for seventeen years. On the morning of September 18th, Frank and his wife jogged around the neighborhood before he left for the bank. Shortly after lunch, his wife called the bank; Mr. Patton's secretary answered. When he took the call, his wife told him "there is someone here that has to talk to you." At that point, a male voice came over the phone and informed Mr. Patton that, "I want you to get some money together in a briefcase."

The caller told Mr. Patton he wanted it in "fifties" and "hundreds." The caller also informed Mr. Patton that the money was to be taken to the picnic area of North Star Mall. While listening to the call, Mr. Patton called the secretary into his office and began to write "extortion threat" on a piece of paper for her to see. Mr. Patton asked how much money the caller wanted. The caller told him to bring "as much as you can get in a brief case." Before hanging up, the caller informed Mr. Patton that he had "forty-five minutes to get the money there, or it will all be over."

Shortly after the extortion call, members of the Castle Hills police department arrived at the bank and informed Mr. Patton that his wife was dead. In an attempt to catch the murderer, Mr. Patton went to the picnic area of North Star Mall and stood by the pay phone for an hour. No one came.

According to Mr. Patton's testimony, he met appellant at Chris Catham's sailboat shop in San Antonio in June of 1985. At that time he informed appellant that he was a bank president in San Antonio. He gave appellant a business card.

Officer Dornak of the Alamo Heights police department was one of a number of law enforcement officers who were dispatched to the Patton home on the afternoon of September 18th. According to Officer Dornak, the rear door of the Patton home was locked with a dead-bolt. There were no signs of a disturbance.

Officer David Anderson, an investigator with the San Antonio police department, testified that he was also dispatched to the Patton home to collect and preserve any available evidence. Officer Anderson obtained seven spent shell casings found near the body. Another investigator with the San Antonio police department, Officer David DeLuna, testified that he recovered three bullet fragments also near Mrs. Patton's body. Officer Giles Fortson Alamo Heights police department testified that he was the first law

enforcement officer to gain entry to the Patton home. When he arrived, Mrs. Patton's body was still "warm to the touch."

Dr. Vincent DeMaio, Chief Medical Examiner of Bexar County, testified that Rebecca Patton had been shot six times in the head. DeMaio recovered the bullet fragments from the skull of the deceased and turned them over to a firearms examiner. According to DeMaio, Rebecca Patton died as a result of multiple gunshot wounds to her head.

Roger Terry, police chief for the city of Alamo Heights, related that on September 25th an individual named Stephen Hurst gave him a brown briefcase. In the briefcase there were two silencers, a .22 caliber Ruger semi-automatic pistol and three boxes of Eley ammunition. Terry took the silencers and the . 22 caliber pistol to the Bexar County medical examiner's office for the purpose of having ballistic tests run on those items. After obtaining these items, the police procured a search warrant for the apartment of John Rogers. Appellant was arrested during the execution of this warrant.

Texas Ranger Bob Steele also assisted in the search of Rogers' apartment. According to Steele, during the execution of the search warrant police officers found appellant in the apartment and promptly arrested him. Rogers had left the apartment prior to the execution of the warrant and was arrested approximately one mile from the residence. During the search, officers found a number of books and newspapers--one of the books told how a person could change his or her identity and the newspapers contained articles about the Patton murder. Officers also found a crumpled, handwritten note containing the following notation:

"Long-Term Strategic Goals: 1. New I.D. w/ complete history. $100 K to $200 K U.S. Cash 3. Closed File on Old I.D."

Allen Southmayd, a forensic document examiner from the Bexar County Regional Crime Laboratory, testified that he made a handwriting comparison between a job application filled out by appellant, a "bill of sale" also filled out by appellant and the "Things To Do" note found in the Glendale apartment. Southmayd concluded that appellant wrote the "Things To Do" note.

Officers also recovered a pair of blood splattered blue jeans from the apartment; and, in Rogers' automobile, they found a pair of black gloves, a map of Belize and a story on the nation of Belize along with a birth certificate belonging to Chris Catham. Jayne Nellis, a forensic serologist with the Bexar County Regional Crime Laboratory, testified that appellant had type "O" blood, while Rebecca Patton had type "A" blood. Nellis also conducted a test on the blood found on the blue jeans seized at the Glendale apartment; this test revealed that the jeans were smeared with type A human blood.

Richard Stengel, a firearms examiner with the Bexar County Regional Crime Laboratory, testified that he performed forensic tests on the Ruger .22 caliber semiautomatic pistol, the two silencers, the bullet fragments that Dr. DeMaio had removed from the skull of the deceased, and the spent shell casings found next to the body. According to Stengel, the ammunition used in the murder was Eley ammunition. Stengel was also able to determine, through test firing of the weapon, that the Ruger .22 caliber pistol was the murder weapon used to cause the death of Rebecca Patton.

Special Agent Larry Swisher of the United States Treasury Department's Bureau of Alcohol, Tobacco and Firearms testified that, according to the Bureau's firearms transaction records, the murder weapon (Ruger pistol, Mark II, .22 caliber, serial number 21097013) was purchased at Don's Gun Sales in San Antonio. The State introduced a document showing that the pistol was purchased in the name

of Randall Wroblewski.

Randall Wroblewski testified that he had been appellant's friend for approximately ten years. Wroblewski related that he had a conversation with appellant concerning appellant's up coming sentencing hearing in federal court. According to Wroblewski, appellant stated, "[i]f I walk in, I'm not walking out, so I'm not going to show up." Appellant also told Wroblewski that if the FBI ever inquired about him (appellant), Wroblewski was not to mention appellant's association with Rogers. Wroblewski also testified that when he purchased the Ruger .22 caliber pistol at Don's Gun Sales he was purchasing it for appellant. Wroblewski related that he paid for the pistol but he immediately gave it to appellant who kept it thereafter. Wroblewski identified State's Exhibit Number 52 as the pistol which he purchased at appellant's request.

The owners of Don's Gun Sales, Don and Leslie Carter, testified that on Labor Day of 1985 appellant visited their home for the holiday weekend. At that time appellant informed Leslie that he owned a .22 caliber Ruger pistol.

One of Rogers' acquaintances, Stephen Hurst, testified that during the late summer and early fall of 1985, he was living with Rogers at Rogers' apartment in San Antonio. According to Hurst, on September 18th, at approximately 5:00 p.m., Rogers gave him a brown briefcase containing three pistols and two silencers. Included among the pistols was a .22 caliber Ruger (identified at trial as the murder weapon). Later that same day, Hurst took the briefcase, containing the weapons and silencers, to the home of John Howells. Howells returned the briefcase with the .22 Ruger to Hurst on September 25th, after which Hurst turned the briefcase and its contents over to the Alamo Heights police department.

John David Howells, a friend of Stephen Hurst and John Rogers, testified that on the day Rebecca Patton was

murdered Hurst came to his home. Hurst brought with him the brown briefcase. The briefcase was locked with a combination lock. Howells did not know the combination. Howells kept the briefcase until the following Monday, at which time John Rogers took it for "two or three" hours. Later that Monday, Howells retrieved the briefcase from Rogers and kept it until the following Wednesday. On that day, Howells returned the briefcase to Stephen Hurst. According to Howells, on the morning before Hurst came to get the briefcase, Hurst had given him the combination to the lock on the briefcase. When Howells opened it, he found that it contained two silencers, a .22 caliber pistol, a couple of boxes of shells and some small rubber disks.

Chris Catham, the owner of Sweetwater Sailcraft, testified that he had known appellant for approximately four years. Appellant worked on a contract basis with Catham until April of 1985 at which time Catham hired appellant to work for an hourly wage. At the time he was hired as a full time employee, appellant filled out and signed an employment application. One of appellant's duties at Sweetwater Sailcraft was to answer the telephone and make a log of incoming phone calls. That telephone log contained an entry from July 12, 1985, which read, "Frank Patton needs to pick up trailer." Catham also identified a birth certificate that he had kept in his sailboat shop office. Catham testified that appellant had free access to the office where the birth certificate was kept. (As mentioned above, the police found Chris Catham's birth certificate in Rogers' automobile on September 30, 1985.)

Jorge Valdez was one of appellant's co-workers from the sailboat shop. While working there, appellant introduced Valdez to Frank Patton. At that time, appellant informed Valdez that Patton was the president of a bank. Henry Holly testified that he had also worked with appellant at the Sweetwater Sailcraft Shop in San Antonio. In early September of 1985, appellant told Holly that he was

> concerned about his upcoming sentencing in a San Antonio federal court. Two days after the murder, on September 20, 1985, appellant asked Holly if he could help him get to Belize by giving him a ride to McAllen.
>
> The defense offered no testimony and closed immediately after the State.

Gosch v. State, 829 S.W.2d at 777-82.

2. Punishment Phase

In 1973, Gosch pled guilty and was convicted of two robberies by assault of Bexar County pharmacies. He received ten-year probated sentences in each. His codefendant in the commission of the offenses was John L. Rogers.

In August 1985, Gosch pled guilty in the United States District Court to the manufacture and sale of a silencer. He did not report for his original sentencing hearing on September 20, 1985, but was sentenced on October 25, 1995.

There was also evidence of three disciplinary infractions committed by Gosch while he was incarcerated prior to the capital trial. In December, 1985, a bundle of match heads the size of a fist was found wrapped in toilet paper in his cell. 9 SR 126-29. In January, 1986, Gosch was taken four or five blocks from the county jail to the office of an eye doctor. There, he picked up a paper clip and attempted to hide it in his hand. 9 SR 131-38. Finally, he hid in his cell a wooden commode brush handle, which can be fashioned into a weapon. 9 SR 138-44.

Robert Ellis, commander of the San Antonio Police Department bomb squad, investigated the explosion at Gosch's home, in which Gosch lost the fingers on his left hand. According, to Ellis, he found nitroglycerine and other explosive compounds in the garage, two jars of picric acid in the house, and nitroglycerine in the bedroom where the explosion occurred. A few days later, at Gosch's father's request, Ellis

returned to the home that Gosch shared with his father and retrieved two homemade blasting caps and one small jar each of picric acid and lead azide. 9 SR 174-182.

Finally, through the testimony of FBI Agent Vandaloo, an HNK submachine gun with a suppressor and a magazine were identified as belonging to Gosch and having been found under a bed in Rogers' apartment. 9 SR 220-225.

Two witnesses testified on Gosch's behalf. Preston Kendall, a former co-worker at Marquis Electric Car, described Gosch as easy going and non-violent. 9 SR 230. This assessment of Gosch's nature was shared by his father, Wesley Gosch. According to Wesley Gosch, Gosch's fascination with explosives was short lived and his interest in guns was in their craftmanship not in their use. 9 SR 241-269.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THE COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons. Gosch has failed to advance a compelling reason for review of this case, and none exists. Further, the issue in this case involves only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

GOSCH IS NOT ENTITLED TO A FULL YEAR TO LITIGATE HIS CLAIMS FOR HABEAS RELIEF, AND THE STATE OF TEXAS HAS A LEGITIMATE

INTEREST IN CARRYING OUT GOSCH'S DEATH SENTENCE.

Gosch argues that Congress, through the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), signed into law in 1996, has precluded the State of Texas from setting an execution date within the AEDPA's one-year limitation period in which federal habeas petitioner's may seek relief. Gosch, though couching this claim in terms of federal preemption doctrine and the Supremacy Clause, is in effect merely arguing that when Congress set a one-year time limit on the filing of applications for federal habeas relief, *see* 28 U.S.C. § 2244(d), an entitlement was thereby created which guarantees such petitioners a period of one year from the date upon which their convictions become final, with any applicable tolling periods applied, in which to file a petition for federal habeas relief. Gosch extends this argument to assert that any efforts by the state to schedule an execution within this one-year period are preempted by Congress' action in passing the aforementioned statute. This argument is without merit.

The district court below correctly analogized Gosch's argument to *Byrne v. Roemer*, 847 F.2d 1130 (5th Cir. 1988), where the petitioner complained about the State's setting of an execution date within the ninety-day period in which he was entitled to file a petition for certiorari. The court there held that Byrne had "at most, a right to petition for certiorari which must be exercised within ninety days and a right to a procedure through which execution of a judgment may, if the procedure is utilized, be halted during the certiorari process." *Id.* at 1134-35. The Fifth Circuit held that the Louisiana statute at issue, which set Byrne's execution date during the ninety-day period in which he could file for certiorari, "simply d[id] not affect any 'right' which the federal statute confer[red]." *Id.*

Likewise, in Gosch's case, the district court held that "to the extent that [the] AEDPA creates a right to seek review that may be exercised during the one-year period, the Texas practice of setting execution dates within that period simply does not affect any right conferred by [the] AEDPA." *Gosch v. Johnson*, No. V-97-126, 3 (Order of United States District Court, Southern District of Texas, Victoria Division, Dec. 19, 1997).

A natural extension of Gosch's claim that the AEDPA entitles him to a full year in which to file his federal habeas petition would be that he is likewise entitled to a stay of execution over the span of that year. Such a reading of the statute would fly in the face of *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983). Gosch is not entitled to a stay of execution unless he can make a substantial showing of a denial of a federal right. *Id.* In reviewing an application for a stay of execution, the court must consider:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of a stay would serve the public interest.

Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988), *quoting Streetman v. Lynaugh*, 835 F.2d. 1521, 1524 (5th Cir. 1988). Although the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities [*i.e.* the other three factors] weighs heavily in favor of granting the stay.'" *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir.) (*quoting O'Bryan v. McKaskle*, 729 F.2d

991, 993 (5th Cir. 1982), *cert. denied*, 465 U.S. 1013, 104 S. Ct. 1015 (1984)), *cert. denied*, 483 U.S. 1036, 108 S. Ct. 6 (1987).

III.

THAT GOSCH HAS HAD THREE EXECUTION DATES SET OVER THE PERIOD OF HIS INCARCERATION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Gosch alleges that the State of Texas has forfeited its right to execute him, pursuant to the Eighth Amendment, due to the suffering he has undergone in connection with previously scheduled execution dates and due to the length of time he has spent on death row. He claims that to carry out his sentence at this time would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Essentially, Gosch is advancing the argument that the State of Texas cannot execute him because he was subjected to procedures and conditions, associated with his imprisonment and the legal scheduling of his execution dates, that render his execution unconstitutional.

Contrary to Gosch's elaborate assertions of mistreatment while in prison, his claim does not entitle him to federal habeas relief. Even if the challenged conduct violated Gosch's constitutional rights, the violation would not entitle him to federal habeas relief because it does not affect the validity of his conviction or sentence and is, therefore, not cognizable in federal habeas review. 28 U.S.C. § 2254. In the alternative, while the Director denies Gosch's allegations of improper treatment, Gosch's claims, even if true, do not rise to the level of a violation of his Eighth Amendment rights. Similar claims were recently considered and rejected by the Fifth

Circuit Court of Appeals in *White v. Johnson*, 79 F.3d 432 (5th Cir.), *cert. denied*, 117 S.Ct. 275 (1996), and *Lackey v. Scott*, 83 F.3d 116 (5th Cir.), *cert. denied*, 117 S.Ct. 276 (1996). *See also, Lackey v. Scott*, 28 F.3d 486, 492 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 743 (1995). Of the two prongs of this Eighth Amendment claim, the length of time on death row and suffering caused by incarceration and stayed executions, Lackey and White chose to emphasize the length of time, while Gosch emphasizes the number of stayed executions. The shift in focus of Gosch's claim, however, does not negate the fact that it has been presented to and rejected by the Fifth Circuit. In any event, this claim is without merit and, as determined by the Circuit Court of Appeals in *White* and *Lackey*, the granting of relief would require this Court to announce and apply a new rule of constitutional law on collateral review in contravention of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060.

A. Gosch's treatment during incarceration does not affect the validity of his conviction or sentence and, thus, does not establish a basis for federal habeas relief pursuant to 28 U.S.C. § 2254(a).

Initially, even if Gosch's allegations of mistreatment could be established, and even assuming *arguendo* that his constitutional rights were violated *during his incarceration*, he is not entitled to federal habeas relief from his capital conviction on this basis because he does not challenge the validity of his conviction or his sentence. "When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. §2254, it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Coleman v. Thompson*, 501 U.S. 722, 730111 S.Ct. 2546, 2554 (1991), *quoting* § 2254.

It is a very different question that Gosch has asked this Court to resolve. Gosch

questions whether, *while in custody*, his constitutional rights have been violated. The relevant inquiry in a federal habeas action is whether Gosch is *in custody* in violation of the constitution--not whether *while in custody* his rights were violated. This Court has no jurisdiction to grant federal habeas relief on the basis Gosch asserts for relief. This Court exercises no "supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *See, e.g., Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940 (1982). This authority is limited to the review of *convictions* obtained in violation of the Constitution. *Id.* "'Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Id., quoting Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400 (1973). Accordingly, federal habeas inquiry into whether Gosch's rights were violated *during his incarceration* is unauthorized in a proceeding pursuant to 28 U.S.C. § 2254.

The single case in which the Court has addressed the *manner* of carrying out a sentence as a basis for habeas relief *rejected* the theory advocated by Gosch that the suffering involved in carrying out his death sentence implicated his constitutional rights.[3] *See State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S.

[3] To be sure, Gosch cites *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and the Superintendent of Prisons, Saint Catherine's, Jamaica*, Privy Council Appeal No. 10 of 1993 (Judgment of the Lords of the Judicial Committee of the Privy Council, delivered November 2, 1993), for the proposition that a delay in the carrying out of a death sentence could be cruel. Of course, this is authority from a foreign jurisdiction, which is without precedential effect in the court of the United States--and for good reason: the cited authority involves a country with a different constitution and legal system. In fact, the relief granted in that case was due to the failure of the government to carry out the executions in an expeditious manner *as provided by the law of that jurisdiction*. Here, by contrast, any delay was due to the fact that

459, 464, 67 S.Ct. 374, 376 (1947). In *Resweber*, the Supreme Court held,

> Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely . . . We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty. (emphasis added).

State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al., 329 U.S. at 464, 67 S.Ct. at 376. The Court, in turn, upheld the Louisiana Supreme Court's decision that *Resweber* failed to allege a violation of state or national law in any of his petitions. *Id.* at 465-466, 67 S.Ct. at 377. Once again, the Court has directed litigants that the necessary suffering involved in any method employed to extinguish life humanely is not a constitutional issue.

B. Gosch's claim is barred by Teague v. Lane.

Additionally, because this case is on collateral review, Gosch may not obtain relief based a rule of constitutional law that has yet to be announced, or that was announced after his conviction became final on June 23, 1993. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 Gosch's request to extend federal habeas corpus relief to include challenges to the conditions of confinement, rather than the fact of confinement

Gosch was challenging his conviction on appeal and in habeas proceedings, not due to the government's dilatoriness.

is clearly a novel rule of constitutional magnitude. *Preiser v. Rodriguez*, 411 U.S. at 498-99, 93 S.Ct at 1840-1841. Similarly, Gosch's request to apply the holding of a Jamaican case, *see* note 22 *supra*, to the facts in the present case would require the announcement of a new rule of constitutional law setting time limits on a state's right to execute a convicted capital murderer. To the extent that Gosch's claim can be interpreted as including the allegation that, in addition to the conditions of his confinement, his rights have been violated by the length of time he has spent on death row, his claim is correspondingly barred by the principles announced in *Teague v. Lane*. *Id.* Gosch does not address the *Teague* bar in his pleadings on this issue. Nevertheless, for the sake of expediency, should the issue be addressed by Gosch in a subsequent reply in which he may argue his claim falls within a *Teague* exception, the Director will take this, the earliest opportunity, to demonstrate the argument lacks merit.

First, *Teague* allows for the retroactive application of a new rule "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.*, 489 U.S. at 307, 109 S.Ct. at 1073. The new rule sought by Gosch seeks to circumscribe government conduct alone, and as such, does not fall within this exception.

The second exception to the *Teague* bar is reserved for "absolute prerequisites to fundamental fairness that is 'implicit in the concept of ordered liberty.'" 489 U.S. at 314, 109 S.Ct. at 1077. The rule Gosch seeks is clearly inapplicable to this exception. *Id.*

If Gosch were to assert that it would be improper to apply the *Teague* bar to his claim because the claim did not arise until after his case was affirmed on direct appeal, this attempt to escape the rigors of the *Teague* bar would be unyeilding. Gosch would

have to explain why the claim did not arise until after his conviction became final. This position seems to directly contradict the authority upon which he relies, *Pratt & Morgan*, which would hold that any delay between the imposition of a death sentence and its execution beyond five years would be presumptively cruel and inhumane. If such is the case--or if he at any time felt that the slow progression of his appeal was creating an additional burden on him--he could have certainly modified his strategy of bringing his claims in a piecemeal fashion or in the alternative, complained to the Court of Criminal Appeals. Gosch could have filed a motion to expedite or some other motion to inform the court that he was claiming he had a constitutional right to an expeditious resolution of is claims on appeal.[4]

Finally, the concerns underlying the nonretroactivity rule of *Teague* are to provide an incentive for "trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards", while recognizing "that interests of comity and finality must also be considered in determining the proper scope of habeas review." 489 U.S. 306-08, 109 S.Ct. at 1073-74. No basis existed at the time the Court of Criminal Appeals reviewed Gosch's claims on direct appeal--or now, for that matter--which could have possibly informed it that Gosch had constitutional right to an expeditious review. *See Lackey v. Scott*, 28 F.3d at 492. Moreover, not only was there not any authority for Gosch's claim, Gosch never informed the court of the claim until after his direct appeal had been exhausted and his

[4] Although there is no basis for stating such a request to expedite his appeal would not have been received and considered by the Court of Criminal Appeals, even had they chose to ignore such a request. Gosch could have petitioned for writ of certiorari on that claim. *See Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (state procedural rules cannot arbitrarily preclude jurisdiction of Supreme Court).

BEST AVAILABLE COPY

other constitutional challenges had been heard in state court. Thus, the application of the rule Gosch seeks now would unfairly penalize the state for the Court of Criminal Appeals' and state habeas courts' conscientious performance of their duty.

C. *In the alternative, if considered on its merits, Gosch's claim that his execution at this time would constitute "cruel and unusual" punishment is without merit.*

The Supreme Court has interpreted the Cruel and Unusual Clause of the Eighth Amendment to prohibit "those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. at 405, 106 S.Ct. at 2599. In addition, the Supreme Court has interpreted the Cruel and Unusual Clause to prohibit punishment that offends the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598 (1958) (plurality opinion). In determining what standards have "evolved" the Supreme Court has looked to the standards of "modern American society as a whole." *Stanford v. Kentucky*, 492 U.S. 361, 369, 109 S.Ct. 2969, 2975 (1989). *See also Harmelin v. Michigan*, 111 S.Ct. 2680, 2691-92 (1991). Although Gosch places substantial reliance on the standards of other countries, the Supreme Court has emphasized that it "is *American* standards of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant." *Stanford v. Kentucky*, 492 U.S. at 369 n.1, 109 S.Ct. at 2975 n.1 (emphasis in original). To this end, the determination of what constitutes cruel and unusual punishment is "'informed by objective factors to the maximum possible extent.'" *Id.*, 492 U.S. at 369, 109 S.Ct. at 2975, *quoting Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861 (1977). The "evolved standards" thus prohibits "particular forms or 'modes' of punishment--specifically, cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 111 S.Ct. at 2691.

Gosch cannot demonstrate that his execution at this time would have been considered cruel and unusual at the time the Bill of Rights was adopted nor that it would be a cruel method of punishment that is not regularly followed at this time. Gosch death sentence was assessed on January 26, 1984. The trial court could not set an execution date until 1987 because Gosch's direct appeal was pending.[5] Tex. Code Crim. Proc. Ann. art. 42.04 ("When a defendant is sentenced to death, no date shall be set for the execution until after the receipt by the clerk of the trial court of the mandate of affirmance of the court of criminal appeals.").

1. Gosch's execution does not offend contemporary standards of what constitutes cruel and unusual punishment.

Beginning with the Supreme Court's contemporary standard for determining what constitutes cruel and unusual punishment, the delay occasioned while a condemned prisoner pursues direct appeals and collateral relief is not considered cruel or unusual by present standards. At least two United States Courts of Appeals have decided this claim have determined that a more than fifteen-year delay between sentencing and execution does not constitute cruel and unusual punishment. *See Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (rejecting claim that to execute death sentenced petitioner after pursuing appeals and collateral relief for sixteen years is cruel and unusual), *rev'd on other grounds*, 113 S.Ct. 528 (1992) (conviction reversed without prejudice to state's right to seek another death sentence); *Free v. Peters*, 50 F.3d 1362 (7th Cir.) (rejecting claim that to execute death sentenced inmate after pursuing appeals and collateral relief for approximately two decades is cruel and

[5] The Supreme Court denied certiorari review on March 23, 1987. *Gosch v. Texas*, 480 U.S. 940 (1987). Gosch's petition for rehearing was denied on May 4, 1987. *Gosch v. Texas*, 481 U.S. 1043 (1987).

unusual), *cert. denied*, 514 U.S. 1034, 115 S.Ct. 1397 (1995). *See also White v. Johnson*, 79 F.3d 432; *Lackey v. Scott*, 83 F.3d 116.. The approximate eleven years Gosch has spent challenging his conviction and sentence would *a fortiori* would not be unconstitutionally cruel and unusual.

Moreover, due to the added procedural protections in place for those convicted of capital punishment, it is certainly the exception rather than the rule that a death sentence is carried out in less than ten years from the time of sentencing. *See, e.g., Sawyer v. Whitley*, 112 S.Ct. at 2517 (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *McClesky v. Zant*, 111 S.Ct. 1454 (1991) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Harris v. Pulley*, 493 U.S. 1051 (1990) (previous opinion, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871 (1984), demonstrates death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320 (1988) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (denying claim that to execute death sentenced petitioner after pursuing appeals and collateral relief for 16 years is cruel and unusual), *rev'd on other grounds*, 113 S.Ct. 528 (1992) (conviction reversed without prejudice to state's right to seek another death sentence); *Free v. Peters*, 50 F.3d 1034 (rejecting claim that to execute death sentenced inmate after pursuing appeals and collateral relief for approximately two decades is cruel and unusual).

Gosch cannot attribute blame to the Court of Criminal Appeals for the time required to determine his direct appeal. Initially, it is important to note that most states with the death penalty provide for a mandatory appeal to the state's highest court. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic

appeal of all death sentences to the State's Supreme Court."); *Pulley v. Harris*, 465 U.S. at 43 n.7 (noting Georgia statute *requiring* State Supreme Court to conduct proportionality review "much copied"). The automatic appeal for death sentenced convicts provided in Texas was obviously implemented to provide direct access to the Texas' highest court for criminal matters without the necessity of petitioning for discretionary review as required for non-capital offenses. *See and compare* Tex. Code Crim. Proc. Ann. art. 37.071(h) and Tex. R. App. Proc., Rule 200 *et seq.* The fact that capital offenders have direct access to the Court of Criminal Appeals, does not mean that Gosch was required to file an appeal brief or raise the issues that he did. *Cf., Lott v. State*, 874 S.W.2d 687 (Tex.Crim.App. 1994) (conviction and death sentence reviewed for fundamental error because no brief filed on appeal; opinion issued in less than one year after submission).

Assuming *arguendo* that Gosch has a constitutional right to an expeditious review of his conviction and sentence, his active challenge to his conviction and sentence is in conflict with such a right. He cannot, on the one hand, assert various difficult issues on appeal and in a series of petitions on collateral review, and on the other, claim that he is entitled to expeditious resolution of those claims. In this regard, such a right would conflict with the right to be heard on his substantive claims. *Cf., Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968) (delay of eight years between arrest and sentencing did not violate defendant's constitutional right to a speedy trial where the delay resulted from the need to assure careful review of an unusually complex case). Criminal defendants are frequently called upon to choose between two competing rights. *See, e.g., Battie v. Estelle*, 655 F.2d 692, 701-02 (5th Cir. 1981) (right of defendant to present psychiatric testimony constitutes a waiver of defendant's Fifth Amendment privilege against self-incrimination for unwarned statements made to

state's psychiatrist in same manner as would defendant's election to testify). *See also Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975) (although criminal defendant must be afforded assistance of counsel, he is also entitled to represent himself). Thus, even assuming a right to an expeditious appeal exists, which the Director denies, Gosch's assertion of his claims on appeal weighs heavily against any fault of the state for taking the time to conscientiously decide the claims.

In addition, the fact that Gosch has previously had to prepare for an execution does not itself rise to the level of cruel and unusual punishment. The Court addressed a similar issue in *State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S. at 464, 67 S. Ct. at 376; *see* Section A(1), *supra*. The mere fact that Gosch was able to block previously scheduled executions through legal channels certainly does not give rise to a claim that the scheduling of those executions constitutes cruel and unusual punishment. Thus, Gosch cannot demonstrate that his execution would be considered cruel and unusual by contemporary standards, either because of the time taken to resolve his claims on direct appeal and collateral review or because he has previously had to prepare for execution.

2. Gosch cannot demonstrate that his execution would have been considered cruel and unusual at the time the Bill of Rights was adopted.

Gosch also cannot demonstrate that the delay occasioned by his pursuit of appeals and collateral relief would have been considered cruel and unusual punishment at the time the Bill of Rights was adopted. While Gosch may accurately assert that it would not have taken near the amount of time to carry out death sentence at the time the Bill of Rights was adopted as it does today, he in no manner demonstrates that the reasons for the swiftness with which executions were previously carried out had anything to do with the conceptions of cruelty to the condemned. *See Pratt & Morgan*,

slip op. at 2 (discussing swiftness of carrying out executions in eighteenth- and nineteenth-century England, but not discussing reasons). Contrary to Gosch's assertions, the procedures to which Gosch has been subject, which has allowed him to attack his conviction on direct appeal and in collateral proceedings, exhausting every imaginable claim at the expense of the state, are quiet generous by the standards employed at the time the Bill of Rights was adopted.[6] *See, e.g., Ford v. Wainwright*, 477 U.S. at 406, 106 S.Ct. at 2600 (noting "sparing humanitarian concessions of our forebears"). Gosch has therefore provided no basis to conclude that his execution would have been considered cruel and unusual at the time the Bill of Rights was adopted.

D. Allowing the avoidance of an execution due only to the amount of time spent pursuing unsuccessful appeals would itself be arbitrary and capricious.

As recognized in *Richmond v. Lewis*, 948 F.2d at 1491-92, allowing death-sentenced inmates, who have the most complex issues on appeal and lawyers most skillful at dilatory tactics,[7] to avoid a death sentence due to the delay thus created would itself be arbitrary and capricious and, therefore, unconstitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972). *Richmond v. Lewis* bears quoting in this respect.

> It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the

---

[6] For example, at the time the Bill of Rights was adopted, criminal defendants were not entitled to an appeal or appointment of counsel at trial, much less the appointment of counsel on appeal and collateral review.

[7] It cannot be doubted the dilatory tactics in capital cases are not regularly and skillfully employed. Numerous courts have commented on the practice. For example, in *Evans v. Bennett*, 440 U.S. 1301, 1307, 99 S.Ct. 1481, 1484 (1979), Justice Rehnquist ordered counsel to provide a detailed account as to why he waited until approximately one week prior to his client's scheduled execution to file a petition and then explained

> merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, *death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates--less successful in their attempts to delay--would be forced to face their sentences.* Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last line of appeals fails on the merits.

Richmond v. Lewis, 948 F.2d at 1473(emphasis added). No reason exists to allow death sentenced inmates to benefit from the unsuccessful pursuit of appeals.

Finally, Gosch has not made a substantial showing that he has been denied a constitutional right. Therefore, he is not entitled to neither a stay of execution nor habeas relief.

IV.

GOSCH IS NOT ENTITLED TO A STAY OF EXECUTION.

Gosch is not entitled to a stay of execution, because he cannot demonstrate a substantial denial of a constitutional right that would become moot if he were executed. *See Barefoot v. Estelle*, 463 U.S. 880 (1983). Moreover, where, as here, a petitioner attempts to manipulate the system by filing a last-minute request for stay of execution, the equities favor the respondent and may disentitle the petitioner to a stay of execution. *See Gomez v. United States District Court of the Northern District of California*, 503 U.S. 653 (1993).

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

*MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division

Michael L. Skotnik
MICHAEL L. SKOTNIK
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600
Fax No. (512) 320-8132

ATTORNEYS FOR RESPONDENT

*Counsel of Record

No. 97 7521
A-511

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

LESLIE LEE GOSCH,
Petitioner,
v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

PROOF OF SERVICE

I hereby certify that on the 15th day of January, 1998, one copy of Respondent's Brief in Opposition was faxed to Raoul Schonneman, Maurie Levin, 205 West 9th Street, Suite 201, Austin, Texas, 78701. All parties required to be served have been served. I am a member of the Bar of this Court.

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600

ATTORNEY FOR RESPONDENT

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

RECEIVED
JAN 15 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

MOTION FOR STAY OF EXECUTION

Petitioner Lesley Lee Gosch, an indigent, respectfully moves this Court to stay his imminent execution, presently set for January 15, 1998, at 6:00 p.m. CDT. The grounds in support of this Motion are set forth fully in Mr. Gosch's Petition for Writ of Certiorari, filed herewith.

Respectfully submitted,

MAURIE LEVIN*
Texas Bar No.00789452
Member, Supreme Court Bar

RAOUL SCHONEMANN*
Texas Bar No. 00786233

P.O. Box 280
Austin, TX 78767
512.320.8300
512.477.2153[fax]

*Counsel of Record

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Stay of Execution was served on counsel for Respondent by facsimile transmission to: Michael Skotnik, Capital Litigation Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, 512-320-8132, this 15th day of January, 1998. I further certify that all parties required to be served have been served.